United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1091

To be argued by
MICHAEL D. ABZUG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1091

UNITED STATES OF AMERICA,
Appellant,

—v.—

RALPH CECCOLINI,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

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Docket No. 76-1091

UNITED STATES OF AMERICA,

Appellant,

—v.—

RALPH CECCOLINI,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES

Preliminary Statement

The United States of America appeals, pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291, from an order of the Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York, rendered on February 10, 1976, granting a motion by the defendant to set aside a verdict of guilty.

Indictment 75 Cr. 519, filed June 2, 1975 in two counts, charged Ralph Ceccolini with making false statements in May 1975 before a Grand Jury investigating gambling operations in Westchester County, in violation of Title 18, United States Code, Section 1623. Count One, in substance, charged the defendant with committing grand jury perjury in testifying that he never took

policy bets at his North Tarrytown, New York, flower shop for Francis J. Millow.*

On October 14, 1975 the trial began before the Honorable Lee P. Gagliardi, sitting without a jury. Before evidence was received, the defendant made a motion to exclude the testimony of Government witness, Lois Hennessy, on the ground that her identity was procured by the Government as a result of a search in violation of the defendant's constitutional rights under the Fourth Amendment. The Court reserved decision. Testimony was concluded on October 17, 1975 and the Court reserved decision on the merits as well on the defendant's motion to suppress Miss Hennessy's testimony.

On February 10, 1976, the Court found the defendant guilty on Count One of the Indictment and not guilty on Count Two. In finding Ceccolini guilty on Count One, the Court (App. 10a-12a),** relied on (a) the testimony of Miss Hennessy, an employee in Ceccolini's flower shop, who stated that she had observed customers in the flower shop place bets with Ceccolini and she knew that these bets had been turned over to Millow, and her own betting activities and gambling discussions with Ceccolini; (b) a tape recording of a wire-tapped conversation between Millow and Ceccolini in which Millow asked Ceccolini for his breakdown "day by day"; (c) surveillance testimony of FBI Agent Lance Emory who testified that FBI Agents had observed Millow enter Ceccolini's flower shop and other store fronts for brief periods on various occasions over the period from July 31, 1973 through December 6, 1973, and that, based upon

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* Count Two, on which Ceccolino was acquitted, charged that defendant had made a false statement in the grand jury when testifying that he did not know that Hank Bucci was involved in gambling operations.

** The Transcript of February 10, 1976 is attached to the Appendix as pages 10a-21a. Pages of the Appendix are referred to as "App."

his experience and observations, Ceccolini's flower shop was either a drop stop for policy or a pickup spot for policy (Tr. 302-308, 315-316); (d) surveillance testimony of FBI Agent Emory to the effect that many people were observed regularly entering and leaving the flower shop for periods of only a few minutes, and that these people left without flowers (Tr. 302-308); (e) betting slips seized from Millow's home containing the notation "Chick"; and (f) the testimony of Rosemary Albanese that Ceccolini was known as "Chick" and that she was present during a conversation between defendant and Millow that took place just three days before defendant's Grand Jury appearance in which Millow told Ceccolini:

> "You are going downtown Monday to see the big boys . . . and whatever they ask you, just tell them you don't remember, because if you don't remember, that is not lying. . . ." (Tr. 168).

However, the Court set aside its verdict on Count One on the ground that the discovery in December 1974 by a New York City Police Officer, who was then on a smoking break, of an envelope containing money and policy slips in Ceccolini's flower shop in the presence of Miss Hennessy constituted an illegal search that tainted Miss Hennessy's testimony and that, therefore, the conviction could not stand.*

In the Court's subsequent memorandum decision of April 1, 1976, the Court remarked that "the issue of taint was . . . uncertain." (App. 23a).

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* Although the Court concluded that the case without Miss Hennessy's testimony was strong (App. 16a), the Court found that without this testimony there was an insufficient basis to prove Ceccolini's guilt beyond a reasonable doubt.

Statement of Facts

The facts as adduced at the bench trial with respect to the December 18, 1974 perusal by New York City Police Officer Ronald Biro of the envelope, and the extent *vel non* of utilization thereof by the Government, established the following.*

Ceccolini's flower shop, the Sleepy Hollow Flower Shop, came under periodic surveillance by agents of the Federal Bureau of Investigation between July 1973 and December 1973—one year prior to the December 18, 1974 incident. The Federal Bureau of Investigation, on the basis of its surveillance, reached the conclusions that the Sleepy Hollow Flower Shop was being utilized as a "spot" to pick up gambling wagers and that Francis J. Millow was using the flower shop and other stores on Beekman Avenue in North Tarrytown in connection with his gambling operations (Tr. 315-316).

On December 3, 1974, pursuant to a Westchester County Court Order, (Tr. 244-246) the validity of which was not challenged below, Detective Sergeant Richard J. Spota of the North Tarrytown Police Department overheard a telephone conversation between Millow and Ceccolini, who was at the time in his flower shop, wherein Millow asked Ceccolini for his breakdown "day by day." (App. 12a; GX 13). The Court concluded that this

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*The Court did not hold an evidentiary hearing with respect to (i) the legality of the December 18, 1974 incident or (ii) the independent sources available to the Government that would have led the Government to Miss Hennessy. This was presumably attributable to defendant's failure to make a suppression motion prior to trial. *See, e.g., United States* v. *Rollins*, 522 F.2d 160 (2d Cir. 1975); *United States* v. *Mauro*, 507 F.2d 802 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975). Nonetheless, the Court permitted the defendant to make the suppression motion.

conversation "can only be reasonably interpreted to apply to a betting operation . . . ." (App. 12a).

On December 18, 1974, at about 12:30 P.M., Police Officer Biro, who had been assigned to patrol school crossings on that day (Tr. 203), during a break entered the Sleepy Hollow Flower Shop to enjoy a cigarette (Tr. 185). Biro was talking to Lois Hennessy, a flower shop employee, who was reading a newspaper (Tr. 102) when he observed an envelope with some money sticking out on the top of the cash register drawer (Tr. 185). Biro picked up the envelope, looked at the contents and observed that the envelope contained policy slips and currency (Tr. 185-189). Biro then put the contents back in the envelope and left the envelope on the store counter (Tr. 66). Biro did not tell Miss Hennessy what he had found in the envelope (Tr. 144). In response to Biro's inquiry, Miss Hennessy informed him that Ceccolini had told her to give the envelope to someone (Tr. 65-66). At the time that Biro had picked up the envelope, Miss Hennessy was reading her newspaper (Tr. 102).* When Biro had entered the flower shop, he was on a break and was not engaged in the course of a gambling investigation (Tr. 203).

The next day Biro mentioned his examination of the envelope to Detective DeFalco of the North Tarrytown Police (Tr. 204). Approximately five months later, Biro described the circumstances surrounding his December 18, 1974 examination of the envelope to a Special

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* Miss Hennessy testified that, on December 18, 1974, at approximately 9:00 A.M., shortly after she arrived at the flower shop Ceccolini took one of the store's greeting cards, wrote something on it, put it into an envelope and asked her to give it to Millow (Tr. 62, 64). A few minutes later, he left the store.

At about 12:30 P.M., Patrolman Ronald Biro entered the defendant's flower shop. (Tr. 65). After Patrolman Biro had perused the envelope for a few minutes, he put the envelope back where he found it. (Tr. 66). Approximatly one hour later, Millow entered the store and Miss Hennessy gave him the envelope. (Tr. 67).

Attorney assigned to the Organized Crime and Racketeering Section in the Southern District of New York (Tr. 208-209).

FBI Special Agent Emory stated that he was orally informed of the results of Biro's discovery of the envelope containing policy records shortly after it had occurred by Detective Sergeant Spota or Detective Sergeant DeFalco (Tr. 360, 382). From the information that he received, Emory was under the impression that Biro's activities had been entirely legal (Tr. 361-362).

In or about April, 1975 Emory interviewed Lois Hennessy at her home for about 20 to 30 minutes. Emory also testified that Miss Hennessy and four other people employed at the defendant's flower shop or associated with it were subpoenaed to testify before the grand jury (Tr. 387-389, 407, 425) which had a continuing gambling investigation in progress (Tr. 46a); also subpoenaed was the owner of a sandwich shop in the immediate vicinity of the defendant's store. None of these other individuals was present during the incident with Biro on December 18, 1974 (Tr. 388). Miss Hennessy testified before the Grand Jury in May 1975; two other employees testified in July 1975 (Tr. 407, 425), and another employee testified in October 1975 (Tr. 159).

Emory testified that when he conferred with Miss Hennessy in or about April 1975, at her home in the presence of her mother and sisters, he did not refer specifically to the incident of December 18, 1974 (Tr. 3-71, 109-110).

On cross-examination, Miss Hennessy testified as follows:

> "Q. Miss Hennessy, you told us just before we recessed that when Agent Emory came to your door, he told you that he had gotten your name

from the North Tarrytown police, do you recall that? A. Yes.

Q. Would you give us, as best you recall, the substance of what he said to you about that subject? A. He just said that he had learned that I was employed by Mr. Ceccolini through the police department. He mentioned no names or anything of that sort.

Q. Did you at that time recall the incident with Ron Biro? A. Not really.

Q. You completely forgot——

Mr. Abzug: Objection. Argumentation, your Honor.

The Court: I will permit it.

The Witness: Excuse me?

The Court: It wasn't in your mind at that time?

The Witness: No, I just lost a soft ball game and that wasn't on my mind.

The Court: The answer is no.

Q. As you went through his questions and your answers, did the subject of Officer Biro come up? A. No. He just asked me if I remembered anything in December.

Q. I can't hear you. A. He just asked me if I had remembered an incident that happened in December" (Tr. 124-126).

Emory asked Miss Hennessy, who was then studying police science at Westchester County College, and was interested in police work, if she would be willing to help the Government (Tr. 390). "She said she would." In the course of their meeting, Miss Hennessy related the events of the December 18, 1974 incident to Emory (Tr. 124-126).

Emory thereafter brought Miss Hennessy to the attention of the United States Department of Justice as

a possible witness. He did so because "I knew she had been an employee at the Sleepy Hollow Flower Shop; I knew that supposedly as I had been told she was present the day in which Patrolman Biro saw policy work, and by virtue of her information being an employee, I felt she could aid us." (Tr. 388-392, 403).

Ceccolini appeared before the Grand Jury in May 1975, and made the false statements on which he was found guilty on Count One.

ARGUMENT

POINT I

The trial court erred in suppressing the uncoerced, voluntary testimony of Lois Hennessy (a) which was obtained during a gambling investigation which involved contacts with various flower shop employees and (b) which, in any event, involved no knowledge by the Government agents as to any illegality in the December 18, 1974 incident.

It is clear that the testimony of Lois Hennessy was an act of free will sufficient to purge the taint of any unlawful invasion that may have occurred on December 18, 1974. *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963).

The United States Supreme Court only recently recognized that:

> "There may be room to question whether voluntary testimony of a witness at trial, as opposed to a Government agent's testimony about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure" *United States* v. *Brignoni-Ponce*, 422 U.S.

873, 876 n. 2 (1975), citing *United States* v. *Guana-Sanchez*, 485 F.2d 590 (7th Cir. 1973), *cert. dismissed as improvidently granted*, 420 U.S. 513 (1975).

Brignoni-Ponce thus embodies the well-settled doctrine that where the statement of the witness is "sufficiently an act of free will to purge the primary taint of the unlawful invasion," this attenuates the taint of an unconstitutional search.* These cases reflect the recognition that witness who testify voluntarily and of their own free will can purge the unlawful invasion in a manner not available in connection with items of evidence seized illegally. *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963); *United States* v. *Karathanos*, Dkt. No. 75-1322 (2d Cir. 2/2/76) (Mansfield, *J.*); *United States* v. *Tane*, 329 F.2d 848, 853 (2d Cir. 1964); *United States* v. *Guana-Sanchez*, 484 F.2d 590, 594-595 (7th Cir. 1973); *United States* v. *Watson*, — U.S. —, 44 U.S. Law Week 4112, 4116 (1/26/76). See *Brown* v. *Illinois*, 422 U.S. 590, 597-600 (1975). Both *Brown* and *Karathanos* advert to the "purpose and flagrancy of official misconduct" and "the closeness between the origi-

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* There is at least some question as to whether Biro's off-duty perusal of the envelope during a casual conversation with Miss Hennessy in the flower shop rises to a Fourth Amendment violation of which Ceccolini can complain. It is undisputed that Ceccolini was not present during the December 18, 1974 incident and had transferred an apparently open envelope to Miss Hennessy for delivery to Millow. Miss Hennessy would appear to have been authorized to permit persual of the envelope in the manner that occurred. See *United States* v. *Gargiso*, 456 F.2d 584 (2d Cir. 1972); *In re Fried*, 161 F.2d 453 (2d Cir.), *cert. dismissed*, 332 U.S. 807 (1947); *Roberts* v. *Ternullo*, 18 Cr. L. 2415, 2416 (E.D.N.Y. 1/7/76); *cf. United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 20-22 (2d Cir.), *cert. denied*, 395 U.S. 935 (1969); *United States* v. *Cowan*, 396 F.2d 83 (2d Cir. 1968); *but cf. United States* v. *Epstein*, 240 F. Supp. 80 (S.D.N.Y. 1965).

nal illegality and the witness' testimony" as relevant in this inquiry.

From beginning to end the instant case is a far cry from *Brown*, *Karathanos*, *Tane* or any of their ilk. Here, Police Officer Biro was not pursuing any official duties when he chanced upon the envelope in the flower shop on December 18, 1974; rather, he was taking a smoking break from his school crossing patrol and found Miss Hennessy reading a newspaper. No strong-arm, coercive or flagrant tactics of even the slightest nature are to be found in Biro's conduct. Biro merely asked Miss Hennessy a few questions concerning whose envelope it was. Biro then left the envelope where he found it. In sum, Biro's perhaps unfortunate curiosity can hardly be said to constitute "purposeful and flagrant official misconduct."

Some three or four months later, FBI Agent Emory visited Miss Hennessy for 20 to 30 minutes at about 7:30-8:00 P.M. in her home in the presence of her mother and two sisters (Tr. 153-154). Emory was totally unaware of any illegality on Biro's part (Tr. 362). No specific questions were put to Miss Hennessy about the December 18, 1974 incident (Tr. 289-390). In fact, what appears to have been foremost in Miss Hennessy's mind at the time was a softball game that she had lost (Tr. 125). In the course of the brief interview during which Miss Hennessy related certain facts surrounding the events of December 18, 1974, Emory asked Miss Hennessy "if she would be willing to help the Government, and she said she would and she went about telling me about the fact that she was in Police Sciences at Westchester County College, she was interested in police work" * (Tr. 390). A careful review of this record

* Emory also testified that Miss Hennessy seemed to be a little nervous and that he did not pursue the interview at that time for that reason (Tr. 390-391).

makes clear (i) that at the time of his investigation there had been no knowledge on Emory's part of any illegality as to the intrusion, and (ii) that Miss Hennessy's decision to assist the Government was voluntarily made, entirely of her own free will.

Thus, Miss Hennessy's decision to testify was not the result of any Government pressure, but rather was quite clearly an "act of free will" of sufficient independence "to purge the primary taint of the unlawful invasion." *Wong Sun* v. *United States*, 371 U.S. at 486; *United States* v. *Karathanos*, *supra* at p. 1729. And, as the Court below concluded, Special Agent Emory was unaware that Biro's perusal of the envelope was unlawful (App. 16a). It is thus crystal clear that the Government did not knowingly use an unlawful search to coerce Miss Hennessy into testifying. The Government respectfully submits that the primary taint of any unlawful invasion which may have occurred on December 18, 1974 was long since purged when Miss Hennessy freely agreed to assist the Government. Accordingly, her testimony should properly have been received.

POINT II

The trial court erred when it suppressed Lois Hennessy's testimony since she would have been discovered as the normal output of the Government's investigation, even if the December 18, 1974 intrusion had not occurred.

In *United States* v. *Falley*, 489 F.2d 33, 41 (2d Cir. 1973), this Court held that the Government can overcome an illegal intrusion by establishing the following by a preponderance of evidence:

> "If the investigation was in fact instigated by information that was discovered independently of the

> illegal intrusion and if the illegally obtained information would not have been, in and of itself, sufficient in the normal case to trigger this type of investigation, then the investigation has not been tainted and no indirect, derivative taint attaches to any of the evidence produced by the investigation. Second, the law focuses attention on the investigative findings themselves. If the evidence produced by the investigation was simply the normal output of that investigation, then the investigation findings have not been tainted directly."

United States v. *Capra*, 501 F.2d 267, 280 n. 12 (2d Cir. 1974); *United States* v. *Cole*, 463 F.2d 163, 172 (2d Cir. 1972); *United States* v. *Friedland*, 441 F.2d 855 (2d Cir. 1971); *Virgin Islands* v. *Gereau*, 502 F.2d 917, 927-928 (3d Cir. 1974); *United States* v. *Evans*, 454 F.2d 813, 818-819 (8th Cir. 1972). These cases recognize that the taint from an unlawful search is removed if independent investigation would have led to the evidence in question absent the illegality.

In the instant case, the basis for the trial court's ruling was its conclusion that "while certainly it is possible, perhaps even probable, that the FBI would have interviewed Miss Hennessy later in the course of the gambling investigation (App. 14a-15a) . . . it is . . . clear that the illegal search was at least in part the actual source of the Government's information that Lois Hennessy would be an important witness about Ceccolini's gambling activities, and that prior to the search the Government's attention had not focused on her in that capacity" (App. 14a).

It is apparent, however, that Miss Hennessy's testimoney would have been procured as the "normal output" of its investigation, even apart from the intrusion of December 18, 1974. *Infra*, p. 14. It is also obvious that

the investigation which led to the defendant's grand jury subpoena and the subsequent indictment for perjury committed in May 1975 began long before the December 18, 1974 search.

Special Agent Emory testified that the Sleepy Hollow Flower Shop was under periodic physical and photographic surveillance from July of 1973 to December of 1973 (Tr. 302-308). In December of 1973, one year before the unlawful search, the Federal Bureau of Investigation had concluded on the basis of six months of surveillance that Francis J. Millow was using the Sleepy Hollow Flower Shop (as well as other stores along Beekman Avenue) as a "spot" or place to pick up gambling wagers (Tr. 315-316). *See United States* v. *Falley*, 489 F.2d at 40; *United States* v. *Capra*, 501 F.2d at 280. In addition, prior to December 18, 1974 intrusion, the police had intercepted a telephone call between Millow and the defendant which, as the Court found, made clear that a gambling operation was involved. Thus, it cannot be said that Patrolman Biro's chance perusal of the contents of the envelope initiated the investigation of the Sleepy Hollow Flower Shop and the persons associated with it; at worst, from the Government's viewpoint, Patrolman Biro's perusal of the envelope on December 18, 1974 corroborated the pre-existing conclusion of the Federal Bureau of Investigation that the flower shop was a gambling spot.

Likewise, Patrolman Biro's examination of the envelope in the flower shop and his subsequent conclusion that it contained policy work did not trigger a federal grand jury investigation of the activities surrounding the Sleepy Hollow Flower Shop. The information obtained by Biro occurred only in the context of pre-existing surveillances and the on-going investigation which established that the flower shop was one of the "spots" along Beekman Avenue which was being utilized by Fran-

cis J. Millow to pick up wagers. It is inconceivable that one isolated report by a patrolman from the North Tarrytown Pol Department to the United States Department of Justi that policy work was seen in a flower shop could trigger a special Federal Grand Jury investigation of the people associated with the store without the preexistence of six months of Federal Bureau of Investigation surveillance which established that the activities around the flower shop were probably part of a much larger gambling conspiracy.

Finally, there is ample evidence demonstrating that Lois Hennessy's identity as a potential witness to a crime was "simply the normal output of the (gambling) investigation."

Special Agent Emory testified that, although he had concluded in December of 1973 that the flower shop was a "spot," he never saw gambling "work" pass between Ceccolini and Millow. Special Agent Emory went on to state that since he was unable, through observations alone, to prove the accuracy of his belief that Millow made daily visits to Ceccolini's store to pick up gambling wagers, his next investigative step would have been to contact an informant or, failing that, *to interview employees of the shop.* (Tr. 385-386). And, as the record makes clear, Miss Hennessy, together with various other flower shop employees who had not been involved in the Biro incident, were all subpoenaed before the Grand Jury. Thus, Miss Hennessy would have been uncovered even had the Biro incident not taken place. This is shown by Special Agent Emory's testimony that the reason that he brought Lois Hennessy to the attention of the United States Department of Justice in March of 1975 was because of the Biro incident *and because she was employed by Sleepy Hollow Flower Shop.* (Tr. 403). Just as Biro's intrusion did not trigger the federal investigation

of the activities surrounding the Sleepy Hollow Flower Shop, it is important to note that it was only *part* of the reason that Miss Hennessy was brought to the attention of the Federal Government. Miss Hennessy was an employee of the flower shop and, as in fact occurred, it was only natural that flower shop employees were interviewed and brought before the Grand Jury.

Falley recognized that "(e)ven if the address book had shortened or facilitated the investigation, it did not supply fruit sufficiently poisonous to be fatal." 489 F.2d at 40. As was true in *Falley*, "it would only have been a matter of time" before the Government discovered Miss Hennessy. Thus, this is not a case involving a "hypothetical independent source." *Roberts* v. *Ternullo*, 18 Cr. L. 2415, 2416 (E.D.N.Y. 1/7/76); *United States* v. *Capra*, 501 F.2d at 280.

The conclusion that Miss Hennessy's testimony was a normal output of the gambling investigation is buttressed by the fact that Miss Kosilla, Miss Vitagliano and Mrs. Albanese—all flower shop employees—and Mr. Maladrino were subpoenaed to testify before the grand jury although *none of them were present during the December 18, 1974 intrusion.* Special Agent Emory stated that Mr. Maladrino owned a store on Beekman Avenue approximately one block from the defendant's flower store and that Millow used to visit Maladrino's store before entering the Sleepy Hollow Flower Shop. Miss Kosilla, Miss Vitagliano and Mrs. Albanese were other employees of the Sleepy Hollow Flower Shop who were questioned generally about whether any gambling was being conducted or facilitated at the store (Tr. 408-410, 425-428).

The Government's interest in the Sleepy Hollow Flower Shop was not initiated by the December 18,

1974 intrusion. It is thus obvious that Lois Hennessy would have been identified as a Government witness even without the Biro incident. This is further substantiated by the fact a telephone call from Millow to the defendant at the Sleepy Hollow Flower Shop was intercepted two weeks before the December 18 incident. There can be no dispute that, as the Court found, this call pertained to gambling. Thus, two weeks before the intrusion, the Government possessed evidence which strongly corroborated the Federal Bureau of Investigation's conclusion that Millow was using the Sleepy Hollow Flower Shop to pick up gambling wagers and that a grand jury investigation of the people associated with the shop was merited.

It is thus crystal clear that the testimony of Miss Hennessy was procured as the result of the normal output of the gambling investigation which was already in progress.

POINT III

The testimony of Miss Hennessy adduced at trial, even if the fruits of an illegal search, should be admitted in a perjury prosecution where, as here, the perjury occurred after the intrusion.

Even assuming *arguendo*—and contrary to the position taken herein—that the testimony of Lois Hennessy were somehow construed to be the fruit of an illegal search, it should nevertheless have been considered by the Court below, where the defendant was charged with perjury that occurred five months *after* the unlawful intrusion. The admission into evidence of such testimony would not affect the deterrent purposes of the exclusionary rule because a defendant's future perjury cannot be foreseen by law enforcement agents at the

time an illegal intrusion is conducted. *See United States* v. *Turk*, 526 F.2d 654, 667 (5th Cir. 1976); *United States* v. *Raftery*, Dkt. No. 75-2021 (9th Cir. 4/12/76).

In *United States* v. *Calandra*, 414 U.S. 339, 348 (1974), the Supreme Court recognized that the Fourth Amendment's exclusionary rule does not proscribe the use of illegally seized evidence, or the fruits thereof, in all proceedings or against all persons. Indeed, the rule's application has been restricted to those areas where its remedial objectives are thought most efficaciously served.* *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

Strong countervailing policies exist that argue forcefully in favor of permitting the use of the fruits of illegally seized evidence in a subsequent perjury prosecution. There has been a recognition that "criminals should be detected, and to that end . . . all available evidence should be used." *Olmstead* v. *United States*, 277 U.S. 438 (1928). Far more important, it would be detrimental to the administration of justice to allow a grand jury witness to perjure himself and then invoke the provisions of the exclusionary rule, thus precluding the Government from offering proof of falsity at trial. And, as previously noted, the exclusionary rule has no deterrent effect when applied to perjury committed subsequent to the search. Finally, to apply the exclusionary rule in this context interferes with the effective and expeditious discharge of the grand jury's duties, while not achieving any role in the deterrence of police misconduct.

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* The Supreme Court, for example, has sanctioned the use of illegally seized evidence to impeach a defendant who has falsely testified in his own behalf. *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *see United States* v. *Tramunti*, 500 F.2d 1334 (2d Cir. 1974); Rule 11(e)(6), Fed.R.Cr.P.

CONCLUSION

The order of the District Court should be reversed and the conviction on Count One should be reinstated.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

Docket Entries

FOR THE SOUTHERN DISTRICT OF NEW YORK

75 Cr. 519

THE UNITED STATES OF AMERICA,

—v.—

RALPH CECCOLINI

Defendant

Date	*Proceedings*
6- 2-75	Filed indictment and ordered sealed. B/W ordered. Gagliardi, J. B/W issued.
6- 3-75	Indictment ordered unsealed. Gagliardi, J.
6-16-75	Deft. (atty. present) Pleads not guilty. Deft. continued released on $5,000. P.R.B. Case assigned to Judge Gagliardi for all purposes. Gagliardi, J.
7-23-75	Filed magistrate's orig. papers docket entry sheet, indictment warrant, disposition sheet & appearance bond.
7-30-75	Filed deft.'s motion re: copy inspection, etc.
9-30-75	Filed Govt.'s affdvt. re: response to motion for discovery and b/p.
10-14-75	Deft.'s motion for a non-jury trial and a general verdict. Granted. Waiver signed this date. Non-jury trial begun before Judge Gagliardi.
10-15-75	Trial cont'd.
10-16-75	Trial cont'd.

Docket Entries

10-17-75—Trial cont'd. and concluded-decision reserved. Deft. cont'd. on present bail until dated of decision. Gagliardi, J.

10-15-75—Filed deft.'s waiver of trial by jury. Gagliardi, J.

2-13-76—Filed Govt.'s memo of law re: support assertion that the testimony of L. Hennessey is sufnciently attenuated from the primary illegality of Patrolman Ronald Biro's search on 12-18-74.

2-13-76—Filed Govt.'s memo of laws.

2-10-76—Counts finds deft. guilty on count I, not guilty verdict on count 2. Count I is set aside. Bail exonerated. Gagliardi, J.

2-19-76—Filed Govt.'s notice of appeal from decisions of Judge Gagliardi setting aside verdict on Count 1. Mailed copies.

3-01-76—Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.

3-23-76—Filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.

3-23-76—Filed transcript of record of proceedings, dated 10-14 thru 17-75.

4-07-76—Filed Opinion # 44188—deft. Ceccolini's motion to modify this Court's decision of 2-10-75 etc. Denied. Gagliardi, J. m/n.

Indictment

75 Cr. 516

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—v—

RALPH CECCOLINI,

Defendant.

Counts One and Two

The Grand Jury charges:

1. On or about May 12, 1975, in the Southern District of New York, Ralph Ceccolini, the defendant, having durly taken an oath as a witness that he would testify truthfully in a proceeding before a Grand Jury of the United States duly empaneled and sworn in the United States District Court for the Southern District of New York, and inquiring for that District into violations of federal law, unlawfully, wilfully and knowingly and contrary to said oath did make false material declarations as hereinafter set forth.

2. At the time and place aforesaid, the said Grand Jury was conducting an investigation into possible violations of United States laws prohibiting the conducting, financing, managing, supervising and directing of an illegal gambling business in violation of Title 18, United States Code, Section 1955 and conspiring to do so in violation of Title 18, United States Code, Section 371.

3. It was material to said inquiry that the Grand Jury ascertain information concerning: the extent of the defendant Ralph Ceccolini's knowledge of, and participation in, an unlawful policy, horse, and sports gambling operation in and around North Tarrytown, Yonkers, the upper Bronx, Hastings-on-Hudson, Tuckahoe, Eastchester, and lower New Rochelle; whether the defendant, Ralph Ceccolini, was participating in the aforesaid gambling operation by regularly accepting and collecting policy wagers from individual bettors and transferring them to Joseph Millow at the Sleepy Hollow Flower Shop, 52 Beekman Avenue, North Tarrytown, New York; and whether the defendant, Ralph Ceccolini, was participating in the aforesaid gambling operation by accepting and collecting football and baseball wager from individual bettors and transferring them to Hank Bucci at the Sleepy Hollow Flower Shop, 52 Beekman Avenue, North Tarrytown, New York.

4. At the time and place aforesaid, the defendant Ralph Ceccolini, appearing as a witness under oath in a proceeding before said Grand Jury, did testify falsely with respect to the aforesaid material matters and did make the following false material declarations:

(COUNT ONE)

"Q. Do you know a man by the name of Frank Millo? A. Yes, I do. I don't know hom as Frank. I know him as Joseph.

Q. Does Mr. Millo come into your flower shop often? A. Yes, he does.

Q. For what purpose? A. Well, he comes in the store, I would say, every morning.

Q. Every morning? A. Right.

Q. At what time? A. Ten o'clock. Between 10:00 and 11:00, I would say.

Q. Does he buy flowers every morning at 10:00 o'clock? A. No.

Q. Has he ever bought flowers from you? A. Yes, he has.

Q. How frequently? A. Not every day.

Q. For what purpose does he come into your flower shop at 10:00 o'clock? A. Well,—how should I put it——

Q. Would it help you if I said that the purpose for Frank Millo coming into your flower shop is to pick up policy work? A. No.

Q. That's not the purpose? A. No, it isn't.

Q. What's the purpose? A. I gave him a few bets, I would say probably about three, since I know him. I have known him all his life. I know his family.

Q. You bet, you bet with Mr. Millo? A. I have. I would say about three times.

Q. Policy bets or horse bets? A. No, numbers.

Q. Policy bets? A. Yes.

Q. Three times, you said? A. Yes, I would say about three times.

Q. No more than three times? A. No. I would think so.

Q. In what amounts, do you recall? A. I think a dollar.

Q. Did you give the money directly to him when you were making the bets? A. Yes, I did.

Q. Does he make a notation on a pad? A. Yes, I think he did.

Q. Have you seen that? A. No, but I know that he makes notations. They can't keep it in their head. I haven't seen that.

Q. You stated that Mr. Millo comes into your flower shop every day at 10:00 o'clock? A. Between 10:00 and 11:00.

Q. And yet you've only placed bets with him yourself at 11:00 on three occasions? A. Right.

Q. When were these three occasions? A. I don't remember.

Q. I n the last month? A. No.

Q. Within the last two months? A. I would say before I read about it in the paper, and then I have a fiancee that doesn't like me to gamble, so I stopped.

Q. Before you read about Mr. Millo's arrest in the newspaper, is that correct? A. Yes.

Q. Why else would he come into your flower shop? A. I have known him all my life.

Q. He just comes in to talk to you? A. Talk, sure.

Q. On a regular basis at 10:00 to 11:00? A. I seen him today three times before I came here, and my store is closed. I happened to be on Beekman Avenue where I live, and I seen him, and I talked to him.

Q. He comes back to talk to you every day? A. I would say.

* * * * *

Q. You've never left policy work in an envelope for Mr. Millo? A. No, I haven't.

Q. You've never left policy work in an envelope with one of your girls with instructions to give it to Mr. Millo? A. Not that I remember, Sir.

Q. Directing your attention to December, 1974, have you ever left policy work in an envelope and directed your girl to give it to Mr. Millo? A. To my girlfriend?

Q. To a girl working in your store? A. No.

Q. Never? A. Not that I remember.

Q. Would you remember something like that if you had done it? A. Oh, yes, but I just don't remember, really.

Q. Have you ever left policy work on the counter of your store for Mr. Millo? A. No.

Q. Have you ever left gambling work on the counter of your store for Mr. Millo? A. No.

Q. Have you ever given any type of gambling work in an envelope to Mr. Millo at your store? A. Never happened.

Q. That never occurred? A. No.

* * * * *

Q. Have you ever taken policy bets yourself? A. No, I haven't.

Q. Never? A. No.

* * * * *

Q. Mr. Ceccolini, you stated that Joe Millo comes into your flower shop at ten to eleven every day, right? A. I would say every day. He might miss a day or two, but I would say every day.

Q. On the week days or on the week ends as well, every day that it's open? A. Yes, every day that it's open, I would say. I mean, I didn't see him yesterday at all. I don't think I seen him Saturday.

Q. But generally he comes in at least—A. He does.

Q. —for example, five times a week? A. I would say.

Q. Either from ten to eleven or then to 10:30? A. Yes, I would say.

Q. How long has this been going on, years? A. I would say so. I mean, a couple of years, at least.

Q. A couple of years this has been going on? A. Yes.

Q. And you've stated that the only purpose of those meetings is for him just to say hello? A. Well, to come in and say what's new, talk to me, what new.

Q. He never discusses his gambling business with you? A. No, not at all.

Q. And he never picks up policy work from you? A. Not at all.

Q. Has he ever come in any other time besides ten to 10:30, into your flower shop? A. I was working the

other day for Mother's Day, I think. It was 9:00 o'clock, he stopped by and said hello, and asked if I wanted coffee.

Q. Generally it's in that particular time period? A. Right.

Q. And this has been going on for two years? A. A year and a half, two years, maybe three years."

Q. Don't you find it odd that he is stopping in at particular times? A. No, I don't.

Q. Five days a week? A. I can name you fifty other people that come into my store every day for ten minutes.

Q. For what purpose? A. To say hello, to talk to me. I'll give you the names. You want them?

Q. No, I don't think we are interested in them. Are these individuals passing policy work to you? A. No.

Q. Are these individuals passing policy work to you? A. No.

Q. Are they placing bets with you? A. No, they are not. And a lot of them are young school kids that come into the place to say hello every noontime, 7, 8, 10 of them.

Mr. Abzug: Thank you, Mr. Ceccolini.

COUNT TWO

"Q. Do you know a man by the name of Hank Bucci? A. Sure. Yes, sir, I do.

Q. Do you know that Hank Bucci is working in a gambling operation at this time? A. I read the paper. I know he's been locked up a few time.

Q. Apart from reading the papers, have you heard Mr. Bucci is currently operating a gambling operation? A. Have I heard that he is operating a gambling operation?

Q. Yes. A. No.

Q. Do you know that he is? A. No, I don't.

Q. Just apart from what you read in the papers, you have no knowledge that he's working in a gambling operation? A. Right.

Q. Do you know what he does for a living? A. I seen a sign, and I seen him standing in front of a garage selling old furniture, and stuff like that, on Beekman Avenue, in another part of town.

Q. Has anybody else ever come into your flower shop for the purpose of taking bets from you, apart from Mr. Joe Millo? A. No. Can I say something, sir?

Q. What would you like to say? A. I just want to say something. You asked me questions about people knowing about things that other people do. In Tarrytown there's 4,000 people, and you can't breathe unless somebody knows what's going on.

Q. You state that you know certain things. The Grand Jury wants to know how you know it. A. Oh, oh, I see.

Q. So it doesn't do us any good when you say, I know something and I don't know how I know it. A. I've heard that Mr. Hank Bucci used to be in the business. I heard it in a restaurant. I couldn't tell you who told me, because I can't even remember.

Q. Nobody else has come into your flower shop and taken bets from you? A. No."

5. The testimony of the defendant, Ralph Ceccolini, set forth for the above (Counts One and Two), was, as he then and there well knew, untrue.

(Title 18, United States Code, Section 1623)

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FORELADY

PAUL J. CURRAN
United States Attorney

Transcript of Record of Proceedings
Dated February 10, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Cr. 519

UNITED STATES OF AMERICA,

—v.—

RALPH CECCOLINI,

Defendant.

February 10, 1976
10:20 a.m.

BEFORE:

HON. LEE P. GAGLIARDI,
District Judge.

APPEARANCES:

MICHAEL ABZUG, ESQ.,
Attorney, Special Task Force.

JOEL MARTIN AURNOU, ESQ.,
Attorney for Defendant.

[2] * * *

The Court: Following is the opinion of the Court:

Defendant Ralph Ceccolini was indicted on two counts of perjury allegedly committed on May 12, 1975, in his testimony before a grand jury investigating gambling operations in Westchester County.

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(Dated February 10, 1976)

The defendant duly waived his right to a jury, and, in addition, did not request the facts be specially found as provided for on Rule 23(c). Nonetheless, since this case presents significant legal questions which could not be reviewed if a general finding were made, the Court feels it appropriate to set forth its findings.

On the basis of all the evidence presented before me at trial, I find the defendant Ceccolini guilty of the crime charged in Count 1, and not guilty of the crime charged in Count 2.

The defendant made a motion for a directed verdict, and I assume that would also include a motion now at this time to set aside the verdict of guilty on Count 1.

Mr. Aurnou: Yes, your Honor.

The Court: The indictment charges the defendant with committing perjury as set forth before in Count 1 in testifying that he never took policy bets [3] at his flower shop in North Tarrytown, New York, for Francis J. Millow, and that he did not know that Hank Bucci, in Count 2, was involved in gambling operations.

As set forth in my finding of guilty on Count 1, I find that contrary to his sworn grand jury testimony that the defendant Ceccolini placed and took policy bets for Millow.

This finding is based upon the testimony of Lois Hennessy, an employee of Ceccolini's flower shop in 1974, who stated that she observed customers in the shop place policy and football bets with Ceccolini, and that she knew these bets were later turned over to Millow.

She also testified that she herself had placed football and numbers bets during the football season with Ceccolini, and that Ceccolini had discussed various aspects of his numbers operations with her.

Corroboration of her testimony was furnished by a tape recording of a wire tapped conversation between Millow and defendant in which Millow asked Ceccolini for his breakdown "day by day"; by surveillance reports of FBI agents which show that Millow entered the flower shop daily between ten and eleven, remained only a few moments; and that many people regularly entered and left the shop [4] after a few minutes without buying any merchandise; and (3) betting slips seized from Millow's home containing the notation "Chick," allegedly Ceccolini's nickname.

I consider particularly the tape of the telephone conversation between Millow and Ceccolini, which can only be reasonably interpreted to apply to a betting operation, to be significant corroborating evidence of Lois Hennessy's basic testimony.

Although the defense presented witnesses who testified that Lois Hennessy had a reputation for exaggeration, in light of the strong corroborating evidence in this case I find her testimony credible.

In contrast, I find the defendant's testimony that he never collected policy bets for Millow to be unconvincing at best. Despite the many and fine character witnesses vouching for his reputation for truth and veracity, I find that his testimony on cross-examination about the telephone conversation in which he and Millow discuss the need for "day by day totals" related to only two

football bets in particular strained the credulity of a reasonable person.

I believe on the basis of Lois Hennessy's testimony the defendant on Count 1 is guilty beyond a reasonable doubt.

[5] • • •

With respect to the charge Ceccolini lied when he denied that he knew Hank Bucci was involved in gambling operations, I find that although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt. The defense did establish the possibility that Hank Bucci, who had several previous gambling convictions, was not known by the defendant to be currently involved in gambling at the time the question was asked.

The difficulty with Count 1 arises from the fact that Lois Hennessy's knowledge about Ceccolini's gambling activities first came directly to the attention of the government as a result of an illegal search. The circumstances surrounding the search described by North Tarrytown Patrolman Ronald Biro at length in his testimony at trial need not be repeated here.

I previously ruled the search to be illegal, and I believe that the government tacitly agreed to this conclusion. The question which I asked counsel to address in post trial memoranda is whether that illegal search taints Lois Hennessy's testimony and requires its exclusion from the trial.

I now find that it does. This finding is based on my finding that the government has not sustained [6] its

burden of showing that Lois Hennessy's testimony definitely would have been obtained without the illegal search.

The search in question here took place on December 18, 1974. At that time Ceccolini's flower shop was under surveillance by federal authorities. Patrolman Biro, who made the search, immediately made a report of it to his superiors, who subsequently forwarded it to the FBI.

As a result of this search, Lois Hennessy's knowledge of Ceccolini's gambling operations came directly to the attention of the FBI, and she was shortly thereafter interviewed.

The government contends that since Lois Hennessy was employed in the shop which was already under surveillance the FBI would have inevitably discovered her existence and obtained her testimony for this trial without the illegal search.

I do not agree. Agent Lance Emory, special agent for the FBI in charge of this case, had already stated in response to a question by me that Lois Hennessy came to his attention because of the December 18th incident involving Patrolman Biro and because she was an employee of the shop. It is thus clear that the illegal search [7] was at least in part the actual source of the government's information that Lois Hennessy would be an important witness about Ceccolini's gambling activities, and that prior to the search the government's attention had not focused on her in that capacity.

While certainly it is possible, perhaps even probable, that the FBI would have interviewed Miss Hennessy later

in the course of the gambling investigation, I do not believe that the government has sustained its burden of proving by a fair preponderance of the credible evidence that it would have inevitably come across her in the course of its investigation.

At the time she was interviewed no other employee of Ceccolini's flower shop had been interviewed by the FBI. While it is true that other employees were subsequently interviewed and called before the grand jury, it is not entirely clear that the investigation would have focused on the employees of the flower shop at all were it not for the illegal search and the favorable response of Lois Hennessy to the FBI interview.

Under these circumstances the government's assertion that any taint resulting from the illegal search is purged by the fact that the Hennessy testimony would have been inevitably discovered by the FBI must fail. [8] In order for the inevitable discovery exception to the exclusionary rule, which the government claims this Circuit has adopted in the United States v. Falley, 489 F.2d 33, to be applicable, the tainted evidence discovered must be evidence which absent the illegality would be the normal output of an ongoing lawful investigation.

Here the government has failed to show by the fair preponderance of the evidence that Lois Hennessy's knowledge of Ceccolini's gambling operations and her willingness to cooperate with the FBI was the normal output of the investigation which was in progress at the time of the illegal search. Therefore, even if the Falley case has overruled the Second Circuit's long-standing rejection of the inevitable discovery rule announced in United States v. Paroutian, 299 F.2d 486, it cannot be

relied on here to purge the Hennessy testimony of the taint resulting from the illegal search on December 18th.

Since Agent Emory testified that in seeking to interview Lois Hennessy he did in fact rely at least in part on the information forwarded to him by the local authorities which unbeknownst to him resulted from an illegal search, it is clear that her testimony is the fruit of that illegal search and must be suppressed.

This is not a case in which the question is [9] whether the information obtained was from the illegal activity or from some other independent legal source. Here Agent Emory admitted information obtained in the search was relied on in locating a key witness. Without that witness I find that there was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty of Count 1 charged in the indictment.

Although the corroborating evidence—particularly the wiretapped conversation—is strong when coupled with Lois Hennessy's testimony, standing by itself it is insufficient to prove Ceccolini's guilt beyond a reasonable doubt.

The foregoing constitutes the Court's findings of fact and conclusions of law.

Now, Mr. Ceccolini was released on his own recognizance.

Mr. Aurnou He had posted, I believe, an unsecured bond.

The Court : All right. Bail is exonerated.

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Mr. Aurnou: Your Honor, may I be heard briefly on a technical matter which has left me in some confusion? Perhaps your Honor would indulge me.

The Court: Yes.

Mr. Aurnou: If I understand correctly, your [10] Honor, in reaching a decision in this case, ruled on both counts prior to the time that you made your finding on the motion. Perhaps I misunderstood that.

The Court: Your motion was denied. The motion for a verdict of not guilty was denied.

Mr. Aurnou: I understand. I was talking about the motion to suppress, sir. In other words, this was an unusual case, as your Honor will recall.

The Court: Yes.

Mr. Aurnou: Only in that my client was not aware of the search until the eve of trial. And when I disclosed that matter to your Honor it was agreed that the question of the illegality of the search would be heard at the same time as the trial itself, and I think your Honor will recall we followed precisely that format.

Now, what I was inquiring into, your Honor, was I did not understand—perhaps I am just in error, and I apologize to the Court if that is so—I do not mean to be, but it was my understanding, your Honor, that the ruling on what essentially is a pretrial motion would precede the findings on Counts 1 and 2, and that the findings on Counts 1 and 2 would be based on that evidence which your Honor would not have suppressed.

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[11] * * *

The difference, of course, is one of substance to my client in terms of double jeopardy. For that reason, your Honor, and only for that reason, and respectfully, I would ask you for a clarification, if I may.

The Court: It is my recollection that during the course of the trial the government counsel conceded that the search was illegal. You weren't there, I know—or were you there?

Mr. Abzug: Yes, I was, your Honor.

The Court: Excuse me.

I thought you had conceded——

Mr. Abzug: We didn't concede it, but your Honor made a finding the search was illegal during the course of the trial.

The Court: I think that has been taken care of, Mr. Aurnou.

Mr. Aurnou: I realize it may be improper, but would you consider seeing Mr. Abzug and myself at the bench for just a moment?

The Court: No. I don't think it is necessary.

Mr. Aurnou: I am concerned only with the clarification of the order in which your Honor wishes these to be recorded, and I mean—it may be just my confusion, your Honor, as I say—if that is so I [12] apologize—but the problem I have is one of substance.

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The Court: I would rather not do it right here.

Mr. Aurnou: Very well.

The Court: If you want to submit anything additional on it you are welcome to do it. As you can see, I could have rendered a general verdict.

Mr. Aurnou: I understand that, and that would have in effect had the double jeopardy effect.

The Court: No. I thought this was the appropriate way to see whether or not the determination which I had made as to the inevitable——

Mr. Aurnou: On the inevitable discovery rule, your Honor?

The Court: Yes.

Mr. Aurnou: I certainly take no quarrel with your Honor's ruling. I would only point out to you the reason for my inquiry was that the unusual procedure in this case resulted from the fact that the government did not disclose the existence of the search, and ordinarily that matter would have been covered either at a hearing just prior to the trial, as your Honor customarily would, or even prior to that, and to have the ruling on the merits—

The Court: I excluded what were the results [13] of the search. There is no doubt that I excluded the results of the search.

Mr. Aurnou: I am not very articulate this morning, but I am suggesting if I understood your Honor correctly——

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The Court: I don't think it makes any difference as to when I passed upon the exclusion of the fruits of the search because it was clearly not admissible.

Mr. Aurnou: If that was true, if Lois Hennessy's testimony was a fruit of the illegal search, as I understood your Honor to say, then the decision that your Honor would render on the first count would be precisely the decision that you read toward the end of your opinion with regard to the sufficiency of the evidence. That would provide my client with an acquittal on the merits which would not be appealable, which would be as a matter of double jeopardy law, final.

The Court: No, I don't think this is any different from my letting it go to the jury in a jury case and then setting it aside afterwards because of the legal grounds I have set forth in here, and that is my purpose in rendering the decision the way I have.

If it had gone to the jury I would have excluded, as I did from my own consideration, the envelope [14] and the contents of the envelope, but I would have permitted Lois Hennessy to have testified and let the jury pass upon it, and if they came in with a verdict of guilty, as I would have done on the facts here, then I would have set it aside on the grounds that I have set forth here.

That is the procedure that I follow.

Mr. Aurnou: I understand exactly what your Honor is saying, and I ask you to clarify for that reason, and I am grateful you have.

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My position, just so it is on the record, is if my client were entitled to have the envelope suppressed, and the testimony of Lois Hennessy, and the nature of your reason for setting aside the verdict, then he would have been entitled as a matter of law not to have had the testimony heard.

The Court: I don't see how I could have passed upon the admissibility of Lois Hennessy's testimony until I heard all the testimony at the trial. I certainly could have passed, and did pass, upon the suppression of the fruits of that illegal search by the Tarrytown authorities. If you want to submit anything further to me, you do it.

Mr. Aurnou: I appreciate that, sir.

Memorandum Decisi n

75 Cr. 519

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

RALPH CECCOLINI,

Defendant.

GAGLIARDI, D. J.

The defendant Ralph Ceccolini here moves to modify this court's decision of February 10, 1975 in which his conviction after a bench trial was set aside on the ground that the testimony of Lois Hennessy, the government's key witness, was tainted by an illegal search. Ceccolini's motion to exclude Miss Hennessy's testimony was originally made at the start of the trial, and decision on the motion was reserved. As it was evident that the facts relevant to the motion to suppress might also be central to the trial, the hearing on the motion was consolidated with the trial on the merits.

In its decision, this court found that on the basis of all the evidence in the case, Ceccolini was guilty. It also found that there was an illegal search and that as a direct result of that search, the government discovered the existence of Miss Hennessy. Ceccolini now argues that since the Hennessy testimony was found to be inadmissible, it was error for this court to find Ceccolini

guilty, even though that finding was set aside. Ceccolini's motion is denied.

In light of the serious legal issues raised by the motion to suppress—particularly on the question of taint—it was this court's explicit intention that the government have the right to appeal an adverse decision on that issue. 18 U.S.C. § 3731 clearly contemplates that the government be permitted to appeal trial court rulings which do not place a defendant in double jeopardy. Here Ceccolini was found guilty on the basis of all the evidence presented to this court. His conviction was set aside because evidence adduced at trial indicated that the testimony of the government's key witness was tainted by an illegal search. The hearing on the motion to suppress was consolidated with the trial for the convenience of the court, counsel and the witnesses, without objection by Ceccolini. Furthermore in this case the issue of taint was sufficiently uncertain that had there been a jury trial, the court would have let the Hennessy testimony go to the jury and then ruled on the motion to exclude it in the event Ceccolini were convicted. Under those circumstances, the government would then have had the right to appeal this court's ruling. There is no reason why the government should be deprived of this opportunity because the case was tried without a jury.

The procedure followed here is exactly that which was followed by the court in *United States* v. *Highfill*, 334 F. Supp. 700, 702 (E.D. Ark. 1971). It is fully consistent with the reasoning in recent Supreme Court decisions on double jeopardy. *United States* v. *Jenkins*,

420 U.S. 358, 365-370 (1975); *United States* v. *Wilson*, 420 U.S. 332 (1975); Cf. *United States* v. *Fayer*, 523 F.2d 661, 664 (2d Cir. 1975).

Defendant's motion is thus denied.

So Ordered.

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U.S.D.J.

Dated: New York, New York
April 1, 1976.

★ U. S. Government Printing Office 1976-- 614—350—644

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

June H. Dobson being duly sworn, deposes and says that she is employed in the office of the Strike Force for the Southern District of New York.

That on the 30th day of April, 1976 she served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Joel M. Aurnau, Esquire
14 Mamaroneck Avenue
White Plains, N.Y. 10601

And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

June H. Dobson

Sworn to before me this
30th day of April, 1976

William I. Aronwald

WILLIAM I. ARONWALD
Notary Public, State of New York
No. 4505809
Qualified in Rockland County
Commission Expires March 30, 1977